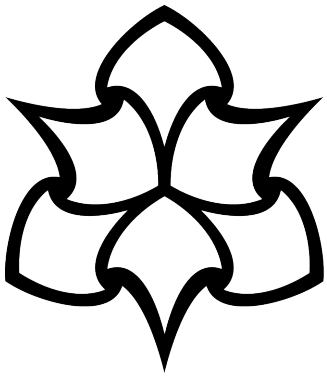

Landlord liability for nuisance tenants: no change

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The recent Court of Appeal decision in *Cocking v Eacott*[1] prompts a re-evaluation of a judicial dogma that has consistently exempted landlords of "adopting" or failing to address the anti-social conduct of their tenants. The law would appear to be conceptually anomalous and perpetuates the inestimable harm suffered by claimants who are often left without a remedy even where the nuisance emanates from common parts over which a landlord has retained control. The courts have been similarly unyielding when considering alternative claims in negligence.

Responsibilities of the landlord: **adopting or continuing a nuisance**

In *Malzy* v *Eichholz*,[2] Lord Cozens-Hardy MR said a landlord would not be liable for a tenant's nuisance "merely because he knows of what is being done and does not take steps to prevent what is being done. There must be something which can fairly amount to his doing the acts complained of … by actual participation by himself".[3] In *Cocking*, Vos LJ stated:[4]

> "[t]o be liable for nuisance, a landlord must either participate directly in the commission of the nuisance by himself or his agent, or must be taken to have authorised the nuisance by letting the property. The fact that a

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[1] *Cocking v Eacott [2016] EWCA Civ 140; [2016] H.L.R. 15.*

[2] *Malzy v Eichholz [1916] 2 K.B. 308*.

[3] *Malzy [1916] 2 K.B. 308* at 315. In *Sedleigh-Denfield v O'Callaghan (Trustees for St Joseph's Society for Foreign Missions) [1940] A.C. 880; [1940] 3 All E.R. 349*, Lord Wright at 904–905 explained that an occupier will be liable for adopting a nuisance where he "did not without undue delay remedy it when he became aware of it, or with ordinary and reasonable care should have become aware of it".

[4] *Cocking [2016] H.L.R. 15* at [23].

landlord does nothing to stop a tenant from causing the nuisance cannot amount to participating in it."

Therefore, adoption, or a landlord's unwillingness to seek the repossession of demised premises once he becomes aware of any anti-social conduct, will not constitute a tenable ground of action in private nuisance. This is consistent with a long line of authority: for example, *Smith v Scott*;[5] *O'Leary v Islington London Borough*;[6] *Mowan v Wandsworth London Borough Council*[7] and, most recently, *Lawrence v. Fen Tigers Ltd (No. 2)*,[8] when Lord Neuberger confirmed "authorization" (and not adoption) to be the primary determinant of landlord liability for tenant nuisance, such requiring "virtual certainty" or "a very high degree of probability" that a letting would result in a nuisance.[9] So, in *Smith v Scott*, the court was unable to find such authorization in circumstances where Lewisham Borough Council had housed a family with a history of troublesome conduct in a house adjoining the claimant's property. The tenancy agreement prohibited nuisance but the family proceeded to cause considerable distress to the claimant. Pennycuick V.C. found that the defendant Council was not liable as "notwithstanding that the corporation knew the Scotts were likely to cause a nuisance", it would not have been "legitimate to say that the corporation impliedly authorized the nuisance" – in other words, it was not virtually certain to have resulted from the purposes for which the property had been let.[10] Although difficult to establish, the courts are at least able to contemplate the imposition of a responsibility for authorization. However, with adoption, there

[5] *Smith v Scott [1973] Ch. 314; [1972] 3 W.L.R. 783; [1972] 3 All E.R. 645*.
[6] *O'Leary v Islington LBC (1983) 9 H.L.R. 81*.
[7] *Mowan v Wandsworth LBC (2001) 33 H.L.R. 56; [2001] B.L.G.R. 228; [2001] 3 E.G. 133 (C.S.).*
[8] *Lawrence v Fen Tigers Ltd (No.2) [2014] UKSC 46; [2015] A.C. 106; [2014] P.T.S.R. 1014* at 113, per Lord Neuberger. This has not been universally accepted. For example, in *Page Motors v Epsom and Ewell BC 80 L.G.R. 337; [1982] J.P.L. 572; (1981)125 S.J. 590*, Ackner LJ at 347 expressed concern that earlier authority had not considered that the non-enforcement of a "covenant against the commission of a nuisance by their tenant could have resulted in their adopting his tortuous behaviour". .
[9] *Lawrence [2015] A.C. 106; [2014] P.T.S.R. 1014* at 133.
[10] *Smith v Scott [1972] 3 W.L.R. 783; [1972] 3 All E.R. 645* at 321.

exists something akin to an exclusionary rule against liability, best summed up by Lord Cozens-Hardy in *Malzy*, who described it as "*an extraordinary proposition*" that landlords could be liable by not taking proceedings against their tenant once they became aware that their tenant was creating a nuisance.[11] It is suggested that the rationale for this is somewhat elusive as:

1. Only the landlord will generally be empowered to seek repossession under the Housing Acts 1985 (secure tenants) and 1988/1996 (assured tenants) (as amended by the Anti-social Behaviour, Crime and Policing Act 2014).
2. Any nuisance will often emanate from common parts, over which the landlord is the "occupier", a scenario which prompted Henry LJ in *Chartered Trust v Davies* to question whether *Malzy* "[was] authority for the proposition that the landlord is never obliged to take action himself to restrain those activities".[12]

The element of "control" as a pre-requisite of liability

Vos LJ, in *Cocking*, when considering who could be liable in nuisance, identified three primary classes of potential defendant: (a) the wrongdoer, (b) the occupier, and (c) the landlord and tenant.[13] Upon closer examination, it becomes clear that whereas the courts will not hold a *landlord* to account for adopting a tenant's nuisance(s), they do consider it just to impose liability upon a wrongdoer or *occupier* for the conduct of trespassers or licencees, primarily because such is viewed as remaining in overall control of the premises.[14] Unlike the landlord, he has not parted with possession. It was with this in mind that the

[11] *Malzy [1916] 2 K.B. 308* at 316.
[12] *Chartered Trust Plc v Davies (1998) 76 P. & C.R. 396; [1997] 2 E.G.L.R. 83; [1997] 49 E.G. 135* at 139.
[13] *Cocking [2016] H.L.R. 15* at [22].
[14] In *Winch v Mid Bedfordshire DC 2002 WL 1876048* at [45], Astill J defined an "occupier" of land as "the person who has a legal interest in possession … giving him effective control". He further stated that "if the legal owner can obtain immediate possession he will be liable as the occupier; if he cannot he will not" (at [37]). In that case, the defendant council retained control having granted only licences to travellers.

Court of Appeal (Arden, McFarlane, Vos LJJ) considered the potential liability in nuisance of the defendant property owner who, despite not living at the property, had permitted her daughter to reside there under a bare licence, during which time there occurred considerable nuisance in the form of shouting and excessive dog barking. The defendant had retained, *de jure*, possession and control throughout and, significantly, had secured but declined to enforce a possession order against her daughter. The Court of Appeal confirmed the defendant's liability for having adopted the nuisance, not in her capacity as a landlord, but as an occupier who would "normally be responsible for a nuisance even if he did not directly cause it, because he is in control and possession of the property".[15] Essentially, the defendant, having retained such control, could have abated the nuisance by enforcing the possession order. In concurring with the judge's reasoning at first instance, Vos LJ concluded "that Mrs Waring had been able to abate the nuisance but chose to do nothing".[16] Arden LJ agreed that the defendant "was liable in law for the nuisance caused by her daughter's dog because as licensor she is to be treated as in occupation of the property. She is not in the same position as a landlord who has parted with possession".[17] Unlike Vos LJ, however, she suggested that the occupier is liable simply because he retains control of the property, there *not* being a need for the intercession of adoption and an analogous engagement with other authority.[18]

So, if control *is* indeed the true test of adoption, it would appear rational for a landlord to bear the responsibility for any nuisance emanating from those areas over which he *does* retain control, more specifically, common parts.

[15] *Cocking [2016] H.L.R. 15* at [25], per Vos LJ.
[16] *Cocking [2016] H.L.R. 15* at [28]. Vos LJ did remind us that merely referring to an arrangement as a licence will not be conclusive. Whether there is in fact a tenancy will be determined by looking at the reality or substance of the agreement: *Street v Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877; (1985) 17 H.L.R. 402* at 819, per Lord Templeman.
[17] *Cocking [2016] H.L.R. 15* at [35]
[18] *Cocking [2016] H.L.R. 15* at [40].

Significantly, this was acknowledged (albeit in a commercial context) in *Chartered Trust*, where the court found a landlord of a shopping mall liable for having adopted the nuisance of a lessee. Lord Neuberger, in *Lawrence*, when considering this case, suggested that "[s]ince the landlords were in possession and control of the common parts, where the nuisance was occurring, the decision may well have been justified on orthodox grounds".[19]

It is on this basis, that the perfunctory dismissal of claims against landlords for the adoption of nuisances becomes all the more questionable, especially when considering the facts of the now notorious *Hussain v Lancaster City Council*.[20] Here, the claimants were joint owners of the freehold to a shop and living accommodation and were, over several years, subjected to incessant and malevolent racial harassment and abuse as well as assaults, firebomb attacks and criminal damage. Due to witness intimidation and a failure on the part of the courts to impose sufficiently rigid punishment on the culprits, the claimants brought an action against the defendant local authority. This was on the grounds of adoption of the nuisance by the defendant and a negligent failure to exercise their statutory powers under housing legislation. Whilst the Court of Appeal acknowledged that the case raised important issues as to whether a landlord could be liable in negligence or nuisance for failing to prevent tenants and/or members of their households from committing criminal acts of harassment and nuisance, it concluded that the relevant acts "did not involve the tenants' use of the tenants' land and therefore fell outside the scope of the tort".[21] This would appear to be inconsistent with aforementioned authority and ostensibly ignored

[19] *Lawrence [2015] A.C. 106; [2014] P.T.S.R. 1014* at 114. There was an application of such orthodoxy in *Nynehead Developments Ltd v RH Fibreboard Containers Ltd [1999] 1 E.G.L.R. 7; [1999] 02 E.G. 139* where it was claimed that the common lessor of retail units had failed to prevent the parking of vehicles by tenants on the forecourt of the claimant's property. Weeks J held at 142 that the agent of the defendant had "consented to or connived at the nuisance, and Nynehead has therefore adopted it and is vicariously liable".
[20] *Hussain v Lancaster City Council [2000] Q.B. 1; [1999] 2 W.L.R. 1142; (1999) 31 H.L.R. 164*.
[21] *Hussain [1999] 2 W.L.R. 1142; (1999) 31 H.L.R. 164* at [23], per Hirst LJ.

the possibility of the local authority having adopted or continued those nuisances *as occupiers* of the common parts, namely the roads and pavements from where the acts had emanated. Significantly, the Council was empowered to maintain the highways under an agency agreement with Lancashire County Council, which had further incorporated *duties* contained within the Highways Act 1980 "to protect the rights of the public to the use and enjoyment of the highway",[22] thereby recognizing its role as occupier. This decision would appear even less sustainable in light of *Lippiatt* v *South Gloucestershire Council*.[23] There, the claimants were the tenants of a substantial farm located adjacent to land owned by the Council on which travellers had congregated, proceeding to trespass on the claimant's farm, depositing rubbish, causing obstructions and criminal damage. The Court of Appeal held the Council liable as the nuisance had emanated from land over which it had exercised control; essentially, it was the occupier of the land that had been used as a "base" for the nuisance. In articulating the view of the court, Evans LJ suggested that "it may be that the correct analysis…that he is liable, if at all, for a nuisance which he himself has created by allowing the troublemakers to occupy his land and to use it as a base for causing unlawful disturbance to his neighbours".[24] A literal application of this principle renders it difficult, if not impossible, to distinguish *Lippiatt* from *Hussain*. In *Cocking*, Vos LJ placed greater emphasis on *Page Motors Limited v Epson and Ewell Borough Council* (and to a lesser extent, *Winch v Mid-Bedfordshire District Council*)[25] in adjudicating on the matter of adoption, an authority that would seem to fortify further any critique of *Hussain*. In that case, the local authority were dilatory in failing to remove travellers who were causing a nuisance to neighbouring landowners (as in *Cocking*, it secured but did not enforce a possession order, and proceeded to

[22] Highways Act 1980 s.130(1) and (2).
[23] *Lippiatt v South Gloucestershire Council [2000] Q.B. 51; [1999] 3 W.L.R. 137; (1999) 31 H.L.R. 1114*.
[24] *Lippiatt [1999] 3 W.L.R. 137; (1999) 31 H.L.R. 1114 at 61*.
[25] *Winch 2002 WL 1876048*.

provide a range of facilities to the trespassers). It would appear that the only distinguishing factor was that in *Hussain*, the aggressors were tenants, whereas in *Page* and *Lippiatt* they were trespassers- but irrespective, in all three cases, the ineluctable fact is that the nuisances emanated from parts controlled by the defendants.[26]

Alternative redress?

Although described as "*a different class of case*",[27] *Page*, *Lippiatt* and *Chartered Trust* clearly illustrate the fallacious nature of the current law on adoption. There was an acknowledgement of this in *Octavia Hill Housing Trust v Brumby*,[28] where the High Court upheld a refusal to strike-out a claim brought by a tenant for nuisances emanating from visitors to another flat whilst using the common parts. This was on the basis that the question as to whether there was a real prospect of success was to be determined upon consideration of the evidence at trial. This fact-sensitive approach is promising, but, as of yet, embryonic, and in the meantime, the failure of the courts to provide a remedy for adoption has been compounded by the concomitant failure of claims based upon other grounds, notably the failure of public landlords to exercise their discretionary powers to act against nuisance tenants.

In *X v Bedfordshire County Council*,[29] Lord Browne-Wilkinson suggested that the courts should only question the exercise of such a discretion where the decision not to take an action "is so unreasonable that it falls outside the ambit of the discretion conferred upon the local authority".[30] In *Stovin v Wise*,[31] Lord

[26] The decision in *Lippiatt* is not, however, without its difficulties when considering its broader import: holding the council liable in circumstances where their land was used as a mere "base" with the relevant acts taking place elsewhere, suggests that an occupier may have an obligation to control the acts of licencees off his land. In reaching this conclusion, the Court of Appeal placed considerable emphasis on *Attorney General v Corke [1933] Ch. 89* which, it is suggested, does not necessarily provide direct authority for this proposition

[27] *Mowan [2001] B.L.G.R. 228; [2001] 3 E.G. 133 (C.S.)* at [14], per Sir Christopher Staughton.

[28] *Octavia Hill Housing Trust v Brumby [2010] EWHC 1793 (QB)*.

[29] *X (Minors) v Bedfordshire CC [1995] 2 A.C. 633; [1995] 3 W.L.R. 152; [1995] E.L.R. 404*.

[30] *X v Bedfordshire CC [1995] 3 W.L.R. 152; [1995] E.L.R. 404* at 736A

Hoffman considered that the "minimum pre-conditions for basing a duty of care upon the existence of a statutory power … are first that it would …have been irrational not to have exercised the power".[32] This constitutes an often insuperable caveat, augmented by a judicial leaning towards incrementalism in establishing novel categories of duty of care in negligence with the key requirement being whether it is "just, fair and reasonable" to impose a duty.[33] With this in mind, *Hussain* reaffirmed that local authority landlords do not owe a common law duty of care to take steps to bring anti-social conduct to an end, as such *"*would place an intolerable burden on them*"*.[34]

As a counterbalance to the vacuity created by this lack of redress, the *public law* remedy of judicial review could be of some assistance. In *Donnelly v Northern Ireland Housing Executive*,[35] the Northern Ireland Court of Appeal declared that the housing executive had breached Article 8 ECHR- the right to a private and family life and home- by failing to address long-standing and internecine nuisance conduct directed towards the applicant. Essentially, the housing executive had not been able to prove it had taken reasonable and appropriate measures necessary to protect the applicant's human rights. However, in *Mowan*, Peter Gibson LJ sounded a note of caution in respect of such proceedings, when opining that a public landlord might already "have taken into account not only property-management considerations as landlord but also

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[31] *Stovin v Wise [1996] A.C. 923; [1996] 3 W.L.R. 388; [1996] R.T.R. 354*.
[32] *Stovin [1996] 3 W.L.R. 388; [1996] R.T.R. 354* at 953
[33] *Caparo Industries Plc v Dickman [1990] 2 A.C. 605; [1990] 2 W.L.R. 358; [1990] B.C.C. 164* at 618, per Lord Bridge.
[34] *Hussain [1999] 2 W.L.R. 1142; (1999) 31 H.L.R. 164* at 25, per Hirst LJ. Such inflexibility is also evident when considering the problem from a slightly different perspective, this being that local authorities do not generally owe a duty to provide emergency housing for vulnerable adults who are at risk of violent anti-social conduct, where the public body concerned is exercising its statutory duties to re-house: *X v Hounslow LBC [2009] EWCA Civ 286; [2009] P.T.S.R. 1158; [2010] H.L.R. 4*. However, the existence of any duty to act will fall to be determined on a case-by-case basis: *CN v Poole BC [2016] EWHC 569 (QB)* at [44], per Slade J, and will conceivably take into account whether the housing body has assumed a voluntary responsibility towards the tenant so as to demonstrate the existence of Caparo "proximity": *Mitchell v Glasgow City Council [2009] UKHL 11; [2009] 1 A.C. 874; [2009] P.T.S.R. 778*.
[35] *Re Donnelly's Application for Judicial Review [2003] NICA 55; [2004] N.I. 189*.

social services considerations" when deciding not to take action against the nuisance tenant".[36] Such would serve to entrench the considerable, if not insuperable, difficulties faced by victims of nuisance tenants in seeking a remedy against a public landlord, and highlights a broader failure on the part of the law to develop adequate remedies in the years since *Hussain*.

[36] *Mowan [2001] B.L.G.R. 228; [2001] 3 E.G. 133 (C.S.)* at [38].